

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL**



MEMORANDUM

**TO: Vincent Gray
Mayor**

**Natwar Ghandi
Chief Financial Officer**

**FROM: Irvin Nathan
Attorney General**

DATE: September 27, 2013

SUBJECT: Whether Funds Available in the Contingency Reserve Fund May Be Used to Pay For District Government Operations in the Event of a Lapse in Appropriations Causing a Federal Government Shutdown

As you know, Congress may be on the verge of failing to pass an appropriations bill by October 1, 2013 to fund the operations of the federal and District governments for Fiscal Year 2014. Accordingly, we have examined options to determine how the District may lawfully continue to operate during a federal government shutdown. This memorandum explains our considered legal conclusion that the District's contingency reserve fund may be lawfully used to fund District government operations in the event of an appropriations lapse and a federal government shutdown.

ANALYSIS

The District's authority to expend money from the contingency reserve fund is contained in section 450A of the District of Columbia Home Rule Act, approved December 24, 1973, 87 Stat. 790, Pub. L. 93-198, D.C. Official Code § 1-204.50a (2012 Repl.). This section requires the District to establish and maintain the contingency reserve fund and to deposit into the contingency reserve fund, by October 1st of each fiscal year, the amount that may be necessary to maintain a balance in the fund of at least 4% of the District's operating expenditures.¹ In

¹ "Operating expenditures" are defined in section 450A(b)(2) of the Home Rule Act (D.C. Official Code § 1-204.50(b)(2)) as "the amount reported in the District of Columbia's Comprehensive Annual Financial Report for the fiscal year immediately preceding the current fiscal year as the actual operating expenditure from local funds, less

addition, it requires the District to request an appropriation each fiscal year to replenish funds allocated from the fund in previous years to restore the fund to the required balance.² In compliance with this requirement, the District has consistently included a request for an appropriation for the replenishment amount in the annual Budget Request Act, and used the remaining balance in the fund to meet the required 4%. *See, e.g.* the Fiscal Year 2014 Budget Request Act of 2013, D.C. Act 20-127, 60 DCR 11140; the Fiscal Year 2013 Budget Request Act of 2012, D.C. Act 19-321, 59 DCR 7388; the Fiscal Year 2012 Budget Request Act of 2011, D.C. Act 19-92, 58 DCR 5564. There is no indication in section 450A of the Home Rule Act (D.C. Official Code § 1-204.50a) that the District must seek an *annual* appropriation of the entire contents of the fund in order to allocate more than the replenishment amount during the fiscal year, and the District has not done so. The section's direct statement that only the replenishment amount must be appropriated indicates that the funds appropriated annually for replenishment are appropriations (for no specific year) that do not expire at the end of the fiscal year. In addition, Title II of the District's Budget Request Acts typically contains language that excludes from each year's limit on funds appropriated for operating expenses the amounts provided for in section 450A. As a result, the contents of the contingency reserve fund roll over from year to year and remain available until expended for statutorily authorized purposes.

Section 450A(b)(4) of the Home Rule Act (D.C. Official Code § 1-204.50A(b)(4)) states the criteria for the use of funds in the contingency reserve fund:

(A) The contingency reserve fund may only be used to provide for nonrecurring or unforeseen needs that arise during the fiscal year, including expenses associated with unforeseen weather or other natural disasters, unexpected obligations created by Federal law or new public safety or health needs or requirements that have been identified after the budget process has occurred, or opportunities to achieve cost savings.

(Emphasis added). Here, in the case of a shutdown caused by Congress's failure to enact an appropriations bill, Section 450(A)(b)(4) is satisfied. It is a "nonrecurring or unforeseen need[] that arise[s] during the fiscal year," specifically an "unexpected obligation[] created by Federal law" which has resulted in "new public safety and health needs."

First, it is non-recurring *as well as* unforeseen (though under the statute it need only be one of the two). Although threats of government shutdowns have become more common in recent years, most of these threats have been resolved without a lapse, and it is simply impossible to predict with certainty at the time of a fiscal year appropriation whether a congressional budget

such amounts that are attributed to debt service payments for which a separate reserve fund is already established under this title."

² Section 450A(b)(6)(A) of the Home Rule Act (D.C. Official Code 1-204.50a) provides that:

The District of Columbia shall appropriate sufficient funds each fiscal year in the budget process to replenish any amount allocated from the contingency reserve fund during the preceding fiscal years so that not less than 50 percent of any amount allocated in the preceding fiscal year or the amount necessary to restore the contingency reserve fund to the 4 percent required balance, whichever is less, is replenished by the end of the second fiscal year following each such allocation.

impasse will occur or be settled timely. Shutdowns are therefore unforeseen. They are also non-recurring because they rarely occur, the last one being in 1995.

Second, the obligation is created here on the District to fund its daily operations by the Congress's failure to pass its ordinary appropriations acts. The confluence of that failure and the limitations of the Antideficiency Act – which is of course a “Federal law” -- makes the need for funds to operate the District government an obligation on the District created by operation of federal law.

Moreover, Congress' use of the term “including” indicates that this list is not exclusive. Even if the financial needs here were not “created by Federal law,” the budget shutdown qualifies under the statute so as long as it is non-recurring or unforeseen. For the reasons outlined above, it is both.

For all these reasons, we conclude funds in the contingency reserve fund may lawfully be used to fund District operations if the Mayor and the CFO agree that is the District's policy to authorize them for this purpose.³ Specifically, if the Mayor and the CFO decide as a policy matter to use available contingency reserve funds to keep the District government operating, the obligations and expenditures made in the absence of a fiscal year 2014 congressional appropriation would not violate the federal Anti-Deficiency Act, which prohibits District officials from making or authorizing an expenditure or obligation “exceeding an amount available in an appropriation or fund for the expenditure or obligation.” 31 U.S.C. S.1342. As noted above, these contingency reserve funds have already been appropriated on a continuing basis, so a fiscal year 2014 appropriations measure would not be necessary to allow the District to spend them. I note that also that the law does not require that the Council approve the use of the contingency reserve fund by resolution or otherwise: under the Home Rule Act, the responsibility for making the determination rests solely with the CFO and Mayor.

If the District uses funds from the contingency reserve, it would not be necessary for the Mayor, the Council, or the independent agencies to make designations of employees or functions as exempt or to suspend the performance of any of the District's contracts during the period of time in which the contingency reserve fund is funding District government operations. We are advised by the OCFO that the contingency reserve fund could fund District operations for approximately nine business days.

I note that such designations would become necessary, however, if the contingency reserve funds were exhausted before Congress agreed upon an appropriations act or a continuing resolution for all or part of fiscal year 2014. Therefore, while the use of this fund is lawful, *if* the budget shutdown occurs *and* approaches two weeks in length, the District must be mindful of and should continue to prepare to operate under the exempt/non-exempt limitations associated with the Anti-Deficiency Act.

³ In contrast, funds in the emergency reserve fund, also established in section 450A of the Home Rule Act (D.C. Official Code § 1-204.50a), would not be available to continue District government operations into fiscal year 2014. Allocation of these funds is limited, generally, to extraordinary needs of an emergency nature, such as states of emergency or natural disasters.